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Supreme Court of the United States.

OCTOBER TERM, 1923.

No.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Appellant,* *vs.* W. H. OSBORNE, JR., as State Tax Commissioner of the State of Nebraska, et al., *Appellees,*	Docket No. 224. File No. 29413.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, *Appellant,* *vs.* W. H. OSBORNE, JR., as State Tax Commissioner of the State of Nebraska, et al., *Appellees.*	Docket No. 225. File No. 29414.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

REPLY BRIEF OF APPELLANTS.

R. L. KENNEDY,
WYMER DRESSLER,
R. N. VAN DOREN,
Solicitors of Appellants.

JAMES B. SHEEAN,
F. W. SARGENT,
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REPLY BRIEF OF APPELLANTS.

The brief of appellees is directed almost exclusively to the proposition that adequate remedy at law existed under the Nebraska Statutes by virtue of the provisions of Section 5901, providing for a writ of error to the Supreme Court from the final decision of the State Board of Equalization and Assessment. In support of this contention appellees cite the case of *C. R. I. & P. Ry. Co.* v. *State,* decided by the Supreme Court of Nebraska on December 31, 1923.

The so-called remedy by writ of error to the Supreme Court of Nebraska was given consideration by appellants in our original brief and we shall here confine our reply to an analysis of the Rock Island case with comments upon various statements in appellees' brief.

Decision of Supreme Court of Nebraska in C. R. I. & P. Ry. Co. v. State.

1. Assuming for the purpose of argument all that appellees claim for the decision in the Rock Island case, we contend that it can have no controlling effect here for the reason that the decision was not rendered until a year after the trial and decision of the instance case, and is at variance with several prior decisions of that court. The right of appellants to maintain this suit in equity must be determined by the status of the law existing at the time the Bill was filed or, at least, by the status of such law at the time the decision of the three judges was rendered.

Dawson v. *Kentucky Distilleries & Warehouse Co.* 255 U. S. 288.

In the Rock Island case the court holds that where there is discrimination between the assessed valuation of railroad property and other property, whereby railroad property has been assessed upon a basis of actual value and other property upon a fraction only of such value, that the railway company is entitled to have its assessment reduced to the same basis as that of other property. This doctrine is an innovation in the jurisprudence of Nebraska. By several decisions of the Supreme Court of Nebraska, rendered prior to the trial of this case, that court had announced in no uncertain terms that the only remedy of an aggrieved taxpayer for the over-assessment of his property was to procure an increase of the assessment of property under-assessed, and that the court would not reduce the assessment of the property over valued to the basis of that under valued. *Lincoln Telephone Co.* v. *Johnson County,* 102 Neb. 254; 166 N. W. 627; *Sioux City Bridge Co.* v. *Dakota County,* 105 Neb. 843; 182 N. W. 485.

The decision in the Sioux City Bridge Co. case was reversed by this court and is reported in 260 U. S. 441. Pursuant to the mandate of this court, the Supreme Court of Nebraska upon rehearing followed the directions of this court and remanded the record to the District Court. (194 N. W. 729.) Such decision was rendered by the Supreme Court of Nebraska on July 9, 1923.

Counsel for appellees, at pages 27 and 53 of their brief, state that the decision of this court in the Sioux City Bridge Company case was rendered on January 2, 1923, and that the order of the court on which this appeal is taken was not entered until January 10, 1923. This statement by appellees is apparently made in an effort to show that at the time such order was entered the law of Nebraska as announced in *Lincoln Tel. Co.* v. *Johnson County, supra,* and *Sioux City Bridge Co.* v. *Dakota County,* 105 Neb. 843, had been changed.

While it is true that the order from which this appeal was taken was not entered until January 10, 1923, the trial was had in December, 1922, was concluded on December 21, 1922, and the decision of the majority of the three judges was rendered on December 22, 1922, and at the request of counsel for plaintiffs (appellants) the effective date of the order was postponed for the purpose of enabling plaintiffs to bring in by supplemental bill the various new county treasurers who would take office on the 4th day of January, 1923, and thus bind them by whatever proceedings might be had in the action. These facts do not clearly appear from the printed record in this case, but do appear from the printed record in the case of *C. B. & Q. R. R. Co.* v. *W. H. Osborne, Jr. etc.,* which was consolidated with these cases for purposes of trial and is No. 219 on the present docket of this court. (Rec., 381 *et seq.*)

The jurisdiction of the District Court will be determined as of the time this suit was brought and not by any changes in the law subsequent to the trial of the case.

In *Dawson* v. *Kentucky Distilleries & Warehouse Co.* 255 U. S. 288, the court had under consideration this precise question, and the court by Mr. Justice Brandeis, at page 296, said:

> "But whatever remedies Section 162 is now regarded as conferring, it is clear that at the time this suit was brought they were not regarded in Kentucky as sufficiently adequate to oust the jurisdiction of equity to enjoin the illegal collection of taxes. (Citing cases.) * * * Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available."

Not only does the decision in the Rock Island case overrule the previous decisions of the Supreme Court of Nebraska, but in an effort to point out the procedure by which the State Board might upon rehearing correct the inequalities which the Supreme Court of Nebraska found to exist, that court was obliged to select Section 5882 of the Nebraska Statutes, which is found in the article dealing with "Equalization of railroad property by local boards," and this it did notwithstanding the fact that Section 5883 of Nebraska Statutes, immediately following the one referred to by the Supreme Court of Nebraska, limits the scope and effect of Section 5882 to purely local assessments and expressly excludes therefrom the assessment of state, county, township, school district and road district taxes. The tax levied upon the assessment in question is a tax for state, county, township, school district and road district purposes. Both the sections referred to are quoted in the appendix.

Surely appellants in determining what course they

should pursue to obtain relief from the discriminatory and fraudulent assessments complained of could not with any justification have discovered or selected a procedure not included within the statutory procedure governing the State Board of Equalization and Assessment in the assessing of railroad property, but which precedure had to do with local assessments of cities and villages, which assessments are not involved in this action at all.

The Supreme Court of Nebraska recognized another difficulty in the following language at the conclusion of the opinion:

> "While Section 5882, Comp. St. 1922, seems to apply specifically to where 'any tax or part thereof levied under the provisions of this article shall be adjudged illegal and nonenforceable, or shall be set aside by any court of competent jurisdiction on any ground whatever,' and specifies what the duty of the board shall be as to reassessing and redetermining the value in such case, the procedure prescribed for such cases seems to be well adapted to such a case as this, where the assessment of the property of the complainant had been decided to lack uniformity with that of other classes of property."

The decision in the Rock Island case emphasizes the argument made in our original brief that the remedy by writ of error to the Supreme Court of Nebraska was uncertain and doubtful.

2. The provisions of Section 5901, Nebraska Statutes, providing for writ of error to the Supreme Court of Nebraska, as construed and applied by the Supreme Court of Nebraska in the Rock Island case, do not afford appellants an adequate remedy for the correction of the fraudulent discriminations in their assessments here complained of.

The decision in the Rock Island case does clearly recognize and find the discrimination between railroad assessments and the assessments of other property of

which we complain. That decision does in that case reverse the finding of the State Board, and remand the case to it "for further proceedings in accordance with law."

But we contend that the remedy therein indicated is still doubtful and inadequate. It is doubtful in that it does not yet appear what the State Board can or will do in carrying out the mandate of the Supreme Court. If it may be presumed that the State Board will follow such mandate, it is to be observed, however, that the Supreme Court in passing upon the question of valuations and in stating amounts which in its judgment the evidence before the Board showed such values to be, makes this significant statement:

> "The statements of value contained in this opinion are only approximate, and not intended to limit or control the State Board if or when it becomes necessary to assess or reassess the value of complainant's line of railroad in Nebraska."

The case, therefore, goes back to the State Board for a rehearing. That Board is not embarrassed by anything the Supreme Court has said, because that court has directly stated that the Board is not to be bound by its opinion on values. The question of values is the important question for determination. That question is an open one for determination by the State Board.

If the decision of the Supreme Court had placed finality upon the controversy much might be said in favor of the adequacy of the remedy there pointed out. But it is not final and it cannot be said with any assurance that the next conclusion of the State Board will be final, and surely if it does not remove the discrimination here complained of, another writ of error will follow with another reversal of the Board. Just when the assessment there in question will become a finality remains to be seen.

The opinion in the Rock Island case confirms the statements made by appellants in their original brief, that upon writ of error proceedings the Supreme Court of Nebraska would merely affirm or reverse the determination of the State Board; and that it would not consider any evidence not of record before that Board. In its decision the Supreme Court of Nebraska says:

> "We believe that, in reviewing the action of the board, we must consider only those elements of value, the existence of which rests upon the facts in evidence. * * * The following methods of valuation are presented by the record. They do not possess all the elements or factors generally required by the courts, but they are all that were before the State Board, and, since we are merely reviewing their action, we cannot consider any others."

Again the court says:

> "There are other elements of value, which, under the decisions, should or might be considered, but we are confined to the proofs which were actually before the board."

Furthermore, as we have argued in the original brief, the Statutes of Nebraska, Section 5842, direct the State Board of Equalization and Assessment to base its valuation of railroad properties not only upon the reports of railroad companies but upon "all the information which it is able to obtain, including records of the railway commission or other regulatory body." The difficulty, if not impossibility, of making a record before the State Board of Equalization, when its valuations may be obtained from such various sources, is apparent at a glance. The previous decisions of the Supreme Court of Nebraska were that the State Board could not by mandamus be compelled to make a record of the bases of its findings of valuation. *State ex rel.* v. *State Board of Equalization and Assessment*, 81 Neb. 139; 115 N. W. 789.

In the Rock Island case the Supreme Court recognizing this defect in the procedure before the State Board and referring particularly to Section 5842, says:

> "Where such information is considered, the *source from which it has been obtained* should, *so far as possible, be mentioned in the record,* so that a reviewing court may consult the same sources and thus stand in the shoes of the assessing body."

This does not in our judgment indicate an intention to overrule the case in 81 Neb. 139, just cited. We do not wish to be hypercritical, but it seems to us the State Board can comply literally with this direction of the Supreme Court by merely indicating the places from which they get their information without recording what such information was. Furthermore, the Supreme Court indicates that there may be some of this information which the Board will not be able to preserve or even to cite the source from which it is obtained. Thus is the procedure before the Board still left in doubt and still incapable of that clarity of record which must be made inasmuch as the reviewing court is bound absolutely by the record made before the State Board.

It is to be observed that the assessment of railroad property is made in May under Section 5840, and under Section 5847 the State Board is required "to immediately make return to the county clerk of each and every county in which any portion of the railroad property * * * may be located."

When the State Board meets as a Board of Equalization on the first Monday of July, pursuant to Section 5901, the valuation of railroad property has been made and has been certified to the various county clerks and has then been certified back to the State Board for equalization in connection with other property at its July meeting. It is at the July meeting that the hearing is held.

It would seem to be quite impossible at the July meeting to make a record of the sources of information as well as the information itself from and upon which the State Board based its valuation of railroad property made at the May meeting.

That no record is made before the State Board upon which the charge of fraud can be based is clearly indicated from the record of the case before the court in the case at bar. The only record that the Board made as to this assessment at its May, 1922, meeting is the resolution quoted in the bill and found at page 8 of the record. The only evidence before the Board at its July meeting as to railroad values was that furnished by appellants and the only finding made by the Board at the conclusion of that hearing was a resolution that the complainants of the complaining railroad companies be dismissed. (Rec., 167, 168.)

Even though the procedure by writ of error might be considered adequate in the ordinary case of over valuation or under valuation, it does not lend itself to an adequate determination of an alleged discriminatory and fraudulent assessment. The basis of appellants' contention in the court below and in this court is that the State Board of Equalization has continuously and intentionally discriminated between railroad property and other property in tax proceedings. Until the State Board has made its final decision at the conclusion of its July meeting the taxpayer is not in position to charge that fraud has been committed. It would be hoped, if not presumed, that the State Board would correct discriminations in these assessments, and until it had finally acted the charge of fraud could not properly be made. The place to make a record of fraud is not in proceedings before the Board, but in a separate proceeding after the Board has concluded its deliberations.

The case of *Wilson et al.* v. *Ill. So. Ry. Co.*, decided by this court January 14, 1924, involved somewhat the same charge of fraudulent assessment as is made in the case at bar, and in that case the claim was made that the District Court was without jurisdiction because of an alleged adequate remedy at law in the same court. After distinguishing the case of *Keokuk & Hamilton Bridge Co.* v. *Salm et al.* 258 U. S. 122, upon which reliance was made in that case, this court goes further and questions the adequacy of a remedy at law by appeal from the decisions and determinations of local boards, where the charge of fraud against the board is made.

Appellees argue (Brief, pp. 12, 19) that a writ of error would lie from the order of the State Board fixing the value of railroad property. We assume that counsel refers to the value fixed by the board at its May meeting, as that is the only time that the statutes of Nebraska provide for an assessment of railroad property by the State Board. This interpretation of appellees' contention is confirmed by the statement appearing at page 46 of their brief, wherein they say:

> "Appellant might have availed itself of the remedy provided in Sec. 5901, Comp. St. 1922, immediately after its property was assessed on May 1, 1922."

Assuming that the error proceedings provided for in Section 5901 are applicable to the action of the State Board in valuing railroad property in May under Section 5840 (a question as to which there would seem to be grave doubt), of what avail would such proceeding be to appellants as to the charge of discrimination and fraud? All the objections to the proceeding by writ of error from the action of the State Board at its equalization meeting in July apply with added force to such a remedy against the valuation made in May. In addition thereto are the further objections:

That at the May meeting the State Board is concerned only with the assessment of railroad property, no assessments of other property are then before the Board; the charge of fraud here made is based upon the intentional and systematic discrimination between the assessments of railroad property and of other property, and not until the July meeting are the assessments of other than railroad property before the State Board; there could not, therefore, be any relief to appellants from the wrongs here complained of by resorting to error proceedings from the action of the State Board at its May meeting.

A further reason why the proceeding by writ of error is inadequate and fails to afford protection to appellants lies in the fact that no supersedeas issues and no procedure is provided whereby the payment of taxes may be stayed pending the determination of the controversy. This is conceded by appellees at page 45 of their brief. In equity the court upon summary hearing fixes the proportion of the taxes which must be paid as a condition of a preliminary injunction. Upon such payment being made, collection of the remainder of such taxes is enjoined until determination of the suit. Not so upon writ of error. No preliminary summary hearing is had. There is but one hearing and that is the final one in the reviewing court, as the result of which the finding of the State Board is affirmed or reversed. If reversed, as in the Rock Island case, all that the Supreme Court does is to remand the proceedings to the State Board. No proportion of the taxes are held to be excessive, but the whole assessment is set aside and a new assessment made. In the meantime the taxes involved may be collected by distress warrants under Section 6010, Nebraska Statutes (quoted at page 30 of appellants' original brief); or the agents of appellants may have been con-

victed and fined under Section 6017, Nebraska Statutes (quoted at page 31 of appellants' original brief).

But appellees say (Brief, p. 45):

> "No stay of proceedings can be involved in the error proceedings as the cases would have been finally determined long before the statutory liens attached."

Upon what authority do appellees base such assurance? Certainly not upon any statute, for none such exists. If upon the assumption that in the due administration of the law such final decision would be announced prior to the following first day of February, it is but necessary to point out that delays do and will occur even in the orderly and due administration of justice. The decision in the Rock Island case was rendered on December 31st, but there only one railroad was concerned, a much smaller amount of taxes was involved, and a much briefer record was presented. In a case where the taxes of three railroads were involved, each necessitating individual consideration, so far at least as the value of its property was concerned, a decision by the Supreme Court prior to February first would hardly be expected. In the determination of so important a question as the jurisdiction of the United States courts, the issue should not be made to turn upon the exigencies of prompt or delayed decisions of state tribunals.

But let us assume once more that a decision of the Supreme Court of Nebraska upon error proceedings would be rendered prior to February 1st, what is to prevent the various county treasurers from proceeding on February 1st to collect the taxes either by distress warrants or by prosecuting appellants' officers? The statutes (Sections 6010 and 6017) make it the positive duty of the county treasurers to collect these taxes at the time stated. They are not parties to the error proceed-

ings and therefore not bound by the decision therein. *To prevent such action by the county treasurers would necessitate the application to a court of equity for injunctive relief.* Immediately the inadequacy of the remedy by error proceedings must be supplemented by the exercise of equitable jurisdiction. So important it is to have before the court the officers who are charged with the collection of these taxes that appellants advisedly requested of the trial court in this case, (as has been hereinbefore pointed out) that the effective date of the order be postponed until the newly elected county treasurers had taken office in order that the stay of proceedings pending appeal would be binding upon them.

Let us go one step further. There is of course no assurance as to what the decision of the Supreme Court of Nebraska in a given case will be. In the Rock Island case a decision favorable to the railway company was rendered. In another case the court may decide that the plaintiff in error has not successfully attacked the determination of the State Board. Surely the plaintiff in such action would have the right to a review of such judgment by this court upon writ of error or upon certiorari. In such event the time for payment of taxes would expire, and, as no supersedeas from this court could affect public officers not parties to the record, such officers would be required to collect such taxes. If any remedy exists for a recovery of taxes paid under such circumstances, there would of necessity be a multiplicity of such actions, made necessary by the very inadequacy of the remedy in this statutory error proceeding.

We are unable to appreciate the significance or applicability of Section 266 of the Judicial Code quoted at page 45 of appellees' brief. The provisions quoted are based upon two conditions, neither of which are presented here. The staying of proceedings in the federal court is conditioned upon the fact of an action pending

in the state court "to enforce such stay or order," and a stay in such state court in proceedings under such stay or order. No such action was or is pending in the state courts of Nebraska, nor can any stay of proceedings be granted by writ of error to the Supreme Court of Nebraska from the State Board. No basis exists for any analogy between the quoted provisions of Section 266 and the general equity jurisdiction of the federal courts.

The brief of appellees proceeds upon the theory that we are here dealing with the ordinary case of overvaluation of property for which a satisfactory remedy is provided. They ignore the significant and controlling elements of discrimination and fraud which distinguish all the cases upon which appellees rely. Aside from the decision of the Supreme Court of Nebraska in the Rock Island case, no case is cited which approaches the case at bar in either facts or law. We have, we believe, satisfactorily shown the total inadequacy of the remedy adopted in the Rock Island case, and that in any event it cannot control the decision here, as it was not the law of Nebraska when this case was commenced and decided. There is presented in the record before us all the essential elements of federal equity jurisdiction, the exercise of which can alone afford any adequate relief from what is admittedly a clear case, not only of overvaluation but of intentional and systematic discrimination and fraud.

The order appealed from should be reversed.

Respectfully submitted,

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APPENDIX.

SECTION 5882. REDETERMINATION OF VALUE OF PROPERTY. If any tax or part thereof levied under the provisions of this article shall be adjudged illegal and non-enforceable, or shall be set aside by any court of competent jurisdiction on any ground whatever, it shall be the duty of the board, whether any part of the taxes assessed and levied have been paid or not, to forthwith reascertain and redetermine the value of the property of such company or companies, if the same shall be called for by such decision of the court; and, when such reassessment has been made, to make duplicates of the original assessment rolls with their valuations thereon and return the same to the respective officers of the cities and counties as provided in the fifth next preceding section. Whereupon it shall be the duty of the city and county officers, respectively, to make a new computation and extend new levies of taxes against the company or companies affected by the order of the court, which taxes shall be of the same force and effect as an original assessment and levy made in accordance with law. The proceedings for such reassessment and for the extension and collection of taxes upon such duplicate assessment rolls shall be conducted in the method originally provided, as near as may be. The power is hereby given to reassess the property of any company as often as may be necessary until the amount of taxes legally and justly due from any company for any year have been finally and definitely determined under the provisions of this article. In case relevies shall be made, credit may be given thereon of any amounts paid upon the prior levy.

SECTION 5883. LIMITATIONS OF ARTICLE. This article

shall not apply to, nor in any manner affect, the assessment, equalization, levy or collection of any state, county, township, school district or road district tax, nor shall it affect any assessments or levies heretofore made upon any property in the State of Nebraska. Nor shall this article be construed to affect any specific tax which may now or which shall hereafter be provided for by law, upon the property or business of any company or association within this state.